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No. 92-5653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DORSIE LEE JOHNSON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S BRIEF IN REPLY

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QUESTION PRESENTED

Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

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INTRODUCTION

Respondent concedes the basic constitutional principles that govern this Court's resolution of Mr. Johnson's claim. First, Respondent agrees that youth is a powerful and constitutionally relevant mitigating circumstance. Respondent's Brief (hereinafter "R.B.") at 39-40. Accordingly, the jury may not be precluded from giving such evidence mitigating effect in arriving at its sentencing decision, nor may a State place such evidence "beyond the jury's effective reach by precluding the jury from giving it mitigating weight on the ultimate sentencing issues." R.B. at 11. Further, Respondent acknowledges that the Eighth Amendment requires a State to provide the sent-

encing jury with "*a fair vehicle* by which the sentencer may effectively consider relevant mitigating evidence." R.B. at 28 (emphasis in original).

What Respondent does not address—indeed, does not acknowledge—is the substantive inquiry this Court has identified as the "ultimate sentencing issue" in capital cases. This Court's decisions emphasize that the State must permit consideration of mitigating evidence in order to ensure a "reasoned moral response" to the offender and offense. Such a response must permit the sentencer to impose a sentence less than death based on the reduced culpability of the defendant. Because the State resolutely ignores the Eighth Amendment requirement that the jury's verdict reflect a "reasoned moral response" to the evidence, it fails to recognize the utter inadequacy of the bare "special issues" as applied to mitigating evidence of a teenage defendant's youth.

The Texas Court of Criminal Appeals has construed the first special issue to ask a question of *fact*: was the defendant's act "deliberate?" Thus interpreted, this narrow inquiry does not permit a jury to assess the moral significance of a defendant's limited judgment and immaturity, which may call for a sentence less than death. The "deliberateness" question has never been understood to encompass a broad examination of the defendant's background and character, or the circumstances which brought him to the threshold of his arguably "deliberate" act. As a result, under this Court's cases the first special issue as construed by the Texas courts is a patently inadequate "vehicle" for assessing a teenage defendant's moral culpability and the appropriateness of a death sentence for his crime.

Similarly, under Texas law the second special issue *also* asks a question of fact: "is there some probability that the defendant will continue to pose a threat to society?" Contrary to the State's baseless assertions, *see* R.B. at 31-

32, this inquiry has never been interpreted to encompass any "moral" dimension other than the utilitarian one identified by Justice Souter in *Graham v. Collins*, __ U.S. __, 113 S.Ct. 892, 922 (1993) (Souter, J., dissenting). It simply asks the jury to look into the future ("how far" into the future is left to individual whim) and to make a prediction about the defendant's likely behavior. This factual inquiry, much like the inquiry into the defendant's "deliberateness," does not permit an independent assessment of the defendant's moral culpability for the offense already committed. Worse, when applied to a youthful offender, it turns his youth against him as an aggravating factor. For these reasons, the second special issue also fails as a "vehicle" for the jury's "reasoned moral response."

The State's brief distorts the straightforward result required by this Court's cases since at least 1987, mistaking narrow holdings precluding capricious leniency for sweeping limitations on the consideration of mitigating evidence. This confusion is a direct result of the State's failure to understand that this Court has endorsed such appropriate restrictions only in the context of sentencing statutes that otherwise place *no* substantive limitations on the consideration of mitigating evidence.[1] Since acknowledging the centrality of the jury's "reasoned moral response" to evidence at the sentencing phase, this Court has never au-

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[1] *See Saffle v. Parks*, 494 U.S. 484 (1990); *Boyde v. California*, 494 U.S. 370 (1990); and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). The principle underlying these cases is that a capital sentencing scheme meets the constitutional demands of the Eighth Amendment if it does not preclude a sentencer from fully considering mitigating evidence and provides that sentencer with an adequate vehicle for expressing its reasoned moral response to all mitigating evidence presented. Each of these cases involved a capital sentencing scheme in which the jury was specifically instructed to consider all mitigating evidence presented and was empowered to express their reasoned moral response to that evidence in the form of a life sentence. In fact, it was these very qualities of the statutes at issue that led this Court to uphold them.

thorized a state to circumscribe the substantive inquiry into a defendant's moral culpability. In permitting States to structure "how" mitigating evidence may be considered, the Court has emphasized that such structuring must *foster*, not *inhibit*, the "reasoned moral response" that is the touchstone of capital sentencing. Texas' refusal to allow the jury to base its sentencing decision on a direct assessment of the defendant's moral culpability, substituting instead the cramped factual inquiries of the former "special issues," limits jury discretion in precisely this unconstitutional manner.

ARGUMENT

A. RESPONDENT IGNORES THE CONSTITUTIONAL REQUIREMENT THAT THE JURY BE PERMITTED TO CONSIDER A TEENAGE DEFENDANT'S YOUTH AS IT BEARS ON HIS MORAL CULPABILITY.

Respondent claims that the key constitutional question this Court must resolve is whether Mr. Johnson's jury was able to consider his youth *at all* in returning its answers to the "special issues" of the former Texas statute. *See, e.g.*, R.B. at 34, 39, 46. If so, Respondent contends, there can be no Eighth Amendment violation. *Id.* Respondent's argument misapprehends the course of this Court's decisions which hold that the constitutional mandate of individualized sentencing requires States to permit the sentencer fully to consider evidence of the defendant's *reduced moral culpability*. *See* Petitioner's Brief (hereinafter P.B.) at 12-18. Although a State is free to require the sentencer to consider mitigating evidence for *other* purposes—for example, to determine whether the defendant poses a "continuing threat" to society—it is not permitted to *substitute* such inquiries for the fundamental examination of a defendant's culpability and the appropriateness of a death sentence. The "traditional sentencing concerns" and "considerations . . . of public policy" which may counsel consideration of, for example, a defendant's likely future

dangerousness, *see* R.B. at 22-23, are secondary to the constitutional command that a capital sentencing jury determine whether the defendant's moral culpability justifies the imposition of death.

The question for this Court, then, is whether nineteen-year-old Dorsie Johnson's jury, in resolving the factual "special issues," would necessarily have been able to consider his youth *as it bore on his culpability*. A close examination of the "special issues" confirms that no such determination is permitted or required by the former Texas scheme.

Respondent fails to see the gap between the sentencer hearing evidence and whether, under state law, the sentencer is allowed to give that evidence effect. This distinction was expressly recognized with respect to youth and youthfulness in *Eddings v. Oklahoma*, 455 U.S. 104 (1984). *See also Stanford v. Kentucky*, 492 U.S. 361 (1989). It is also crucial to the reasoning in *Morgan v. Illinois*, ___ U.S. ___, 112 S.Ct. 2222 (1992), where this Court held that if even one member of a sentencing jury would not obey instructions that required consideration of mitigating evidence, then the jury as a whole was improperly impanelled.[2]

B. THE FORMER TEXAS SPECIAL ISSUES ARE SIMPLE AGGRAVATING CIRCUMSTANCES THAT REQUIRE A PURELY FACTUAL INQUIRY, AND NEITHER PERMIT NOR REQUIRE A JURY'S "REASONED MORAL RESPONSE" TO MITIGATING EVIDENCE OF YOUTH.

Respondent insists that the unadorned former "special issues," as presented to Mr. Johnson's jury, were adequate

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[2] Indeed, the *Morgan* Court taxed the dissent with overlooking the entire thrust of this Court's capital punishment teaching since 1976. 112 S.Ct. at 2233 ("rejection of the line of cases . . . developing the nature and role of mitigating evidence in the trial of capital offenses . . . is a view long rejected by this Court." (citations omitted)).

vehicles to effect the reasoned moral response required by the Eighth Amendment. R.B. at 39. The "special issues," however, require the jury only to resolve aggravating issues of *fact*; they do not permit consideration of whether Mr. Johnson's youth and unformed character at the time of the crime reduced his culpability such that death was a disproportionately harsh sentence.[3] Respondent fails to show that reasonable jurors would have inferred their constitutional obligation to assess Mr. Johnson's personal moral culpability from the straightforward *factual* determinations required by the two questions as narrowly construed under state law.

1. *THE FIRST SPECIAL ISSUE*

The first "special issue" did not permit consideration of Mr. Johnson's moral culpability for the crime. According to the Texas Court of Criminal Appeals, the first special issue is a tightly focused inquiry that does not authorize general consideration of a defendant's background or character. The unadorned term "deliberately," in the American legal tradition generally and particularly as construed by the Texas Court, is no more than a narrow question of fact regarding a defendant's *mens rea* at the moment of the underlying offense. *See, e.g., Arave v. Creech*, __ U.S. __, 52 Cr.L.Rep. 2373, 2375-2376 (1993) ("The law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a *fact* to be inferred from the surrounding circumstances") (emphasis in original).[4]

[3] Whatever one calls the special issue questions, they *function* as "aggravating circumstances" because they are necessary prerequisite findings that "circumscribe the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 878 (1983). *See also Stringer v. Black*, ___ U.S. ___, 112 S.Ct. 1130 (1992).

[4] In *Creech*, this Court considered the constitutionality of the limiting construction the Idaho Supreme Court had placed on the aggravating circumstance of "utter disregard for human life," which defined that circumstance as referring to a "cold-blooded," "callous," and "pitiless" killer. The Court concluded that these terms did not equate to the *mens rea* concept of premeditation, but rather (through the Idaho Court's limiting construction) referred to a mental state separate from *mens rea*. Texas, of course, chose to incorporate an actual variety of *mens rea*, "deliberateness," in its first "special issue."

The Court of Criminal Appeals has repeatedly emphasized this firm limitation on the scope of "deliberateness" under state law. The Texas Court's authoritative view is reflected in its cases assessing whether the State presented sufficient proof that the defendant acted "deliberately:"

> [T]he common understanding of the term "deliberately" in a capital murder context is "something more than intentionally, . . . [but] less than premeditation, . . . [representing] a conscious decision—greater than mere will—to cause the death of the victim."

Farris v. State, 819 S.W.2d 490, 497 (Tex. Crim. App. 1990) (quoting *Nichols v. State*, 754 S.W.2d 185, 201 (Tex. Crim. App. 1988). *Accord Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991).[5] Thus defined as a mental state sandwiched somewhere in the narrow conceptual space between "intent" and "premeditation," the Texas standard for "deliberateness" requires no searching inquiry into how the defendant's background and character might have influenced his participation in the arguably "deliberate" act. The Eighth Amendment, however, requires precisely such consideration before death may be imposed.

In addition to the Texas Court's formal "definition" of "deliberateness," its *explication* of the term also demonstrates that the jury's affirmative answer in this case did not necessarily reflect a reasoned moral response to Mr.

[5] The Court of Criminal Appeals has long and consistently held, however, that the sentencing phase jury charge in a capital trial need not define "deliberately." *See, e.g., Rector v. State*, 738 S.W.2d 235, 244 (Tex. Crim. App. 1986).

Johnson's youth. When assaying the sufficiency of the evidence of "deliberate" conduct, the court below invariably refers to the same facts underlying the crime which support the inference that it was "intentional"—the standard for *guilt* of capital murder under Texas law.[6] Respondent cannot cite a single case in which the Texas Court has ever indicated that a defendant's moral culpability is relevant to the first special issue. Instead, applying its narrow *mens rea* interpretation of the first "special issue," the court below has simply proceeded mechanically from the finding that the killing was "intentional" to the conclusion that it was also "deliberate." That court, by refusing to require further instruction, plainly understands Texas juries to undertake a similar limited inquiry without engaging in a broad examination of the defendant's moral culpability as reflected by the unique circumstances of his character and background.

That "deliberateness" has no special, broad meaning in Texas, moreover, is consistent with the history of Anglo-American criminal law. Our tradition has long recognized that such terms as "intentional," "deliberate," and "premeditated" do not incorporate richly textured portraits of a defendant's character and background but instead indicate the simple presence or absence of a given state of mind toward a desired end. Indeed, the distinctions among such terms as "intentional" and "deliberate" have proved elusive even upon careful study. As Judge (later Justice) Cardozo remarked after concluding that the "distinction is much too vague to be continued in our law:"

> There can be no intent unless there is a choice, yet . . . the choice without more is enough to justify the inference that the intent was deliberate and premeditated. . . . The present distinction [between intent and deliberation] is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying phraseology, scores of men have gone to their death.

[6] *See* Brief for Petitioner at 29, n.19.

Cardozo, "What Medicine Can Do For The Law," reprinted in *Law and Literature*, 70, 99-101 (1931).

Contrary to Respondent's wishful thinking, the dispositive inquiry for this Court is not how some hypothetical "deliberateness" inquiry might afford a jury a vehicle for the full consideration of mitigating evidence. The question is whether *Texas*' former "deliberateness" question, as construed by *Texas*' highest court and as understood by a reasonable juror without additional instructions, *did* provide such a vehicle. This Court has already settled the issue in *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989): "[p]ersonal culpability is not solely a function of a defendant's capacity to act deliberately."

The foregoing discussion demonstrates that the first special issue provided an inadequate vehicle for the consideration of Mr. Johnson's mitigating evidence of youth as it bore on his moral culpability. There thus exists, *at a minimum*, a "reasonable likelihood" that Mr. Johnson's jury interpreted the first "special issue" to preclude a reasoned moral response to his evidence calling for a sentence less than death. *See Boyde v. California*, 494 U.S. 370, 380 (1990).

2. *THE SECOND SPECIAL ISSUE*

Respondent makes the remarkable assertion that "any dichotomy between 'looking forward' to assess future dangerousness and 'looking back' to the defendant's culpability is of little import." R.B. at 32. On the contrary; this

Court's cases confirm that this distinction is *decisive* in assessing the constitutionality of the second "special issue." Precisely because it focuses the jury's attention exclusively on the defendant's likely future behavior, and away from the extent to which his mitigating evidence reduces his culpability for the present offense, the second question is patently inadequate as applied to evidence of youth.

The Texas Court of Criminal Appeals has construed the former second "special issue" precisely as it has the first—as a narrow factual inquiry, which operates as neither invitation nor command to weigh the defendant's character and background in determining whether a death sentence was an appropriate "reasoned moral response" to his personal culpability for the offense. By its very terms, the second special issue considers only the possibility of future violent conduct by the defendant. Respondent appears to suggest that this inquiry somehow assesses the defendant's moral culpability for the past offense, rather than simply asking whether he may behave in a certain manner in the future. R.B. at 32. Respondent's position is belied by the plain facial meaning of the "continuing threat" special issue as well as the Texas Court of Criminal Appeals' consistent interpretation of that query.

The wholly *factual* character of the narrow prediction of "future dangerousness" under state law is well illustrated by *Ex Parte Mathes*, 830 S.W.2d 596 (Tex. Crim. App. 1992). Mathes committed a double murder and was convicted of capital murder for the death of one victim. The jury, however, returned a negative answer to the second special issue, requiring a life sentence. The State then sought to prosecute Mathes for the death of the second victim, and to obtain the death penalty in connection with that killing. The Court of Criminal Appeals held that collateral estoppel barred such a prosecution:

> Whether there is a probability that a defendant found guilty of capital murder would constitute a continuing threat to society *is an issue of ultimate fact*, the resolution of which in a bifurcated proceeding is determinative of the judgment and sentence of the trial court. A negative answer . . . is the functional equivalent of an "acquittal" of the death penalty.

Id. at 598 (emphasis added) (citing *Bullington v. Missouri*, 451 U.S. 430 (1981)). If, as Respondent suggests, the second special issue were actually a vehicle for measuring moral culpability, R.B. at 32-33, nothing would have barred the State from seeking a death sentence at Mathes' second trial, because Mathes' "moral culpability" for the second killing would not necessarily have been the same as his culpability for the first.

In sum, Respondent is wrong in asserting that a Texas jury somehow "weigh[s] mitigating evidence as it formulates [its answer to the second issue] in a manner similar to that employed by capital juries in 'pure balancing' States." R.B. at 37 (citation omitted). Whether the second special issue might, with adequate instructions, permit such an interpretation does not change the fact that under *Texas* law, the jury is not authorized to conduct any such "weighing." Instead, the jurors are emphatically charged to answer the questions according to their oath. *See, e.g., Boyd v. State*, 811 S.W.2d 105, 120 (Tex. Crim. App. 1991) ("[T]he Texas sentencing scheme does not allow the jury to actually assess a sentence; a jury's role is limited to answering the three special issues"); *Knox v. State*, 744 S.W.2d 53 (Tex. Crim. App. 1987) ("[Jurors'] attention should be directed only to answering the special issues without regard to the sentence that will ultimately be imposed").[7] The "future dangerousness" question thus af-

[7] Respondent argues that jurors, knowing the ultimate effect of their

fords no fair vehicle for broader mitigating consideration of a teenage defendant's character and background as it impacts on his moral culpability.

Finally, Respondent claims that Mr. Johnson's youth could only have supported a negative answer to the second special issue, and thus the "continuing threat" inquiry afforded an adequate vehicle for the full *mitigating* consideration of his unformed character and youthful infirmities. R.B. at 42-46. Respondent's protestations are unconvincing. Indeed, the Texas Court of Criminal Appeals this month acknowledged that a jury may well treat evidence of youth as an aggravating factor under the second special issue:

> [A] jury might also view youth as an aggravating circumstance based upon the belief that the young defendant would simply use his remaining years to continue a life of crime. See *Graham v. Collins*, 113 S.Ct. at 917 (1993) (Souter, J., dissenting).

Zimmerman v. State, No. 71,106 (Tex. Crim. App. April 7, 1993) slip op. at 23. This simple recognition eloquently refutes Respondent's desperate denials. Indeed, the very fact that only the aggravating "edge" of Mr. Johnson's youth could be given effect under the second special issue requires resentencing.[8]

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answers, would be inclined to give full effect to mitigating evidence. Under the "special issues," of course, this assumption anticipates that jurors would regularly and flagrantly violate their oaths—making their verdict more, not less, capricious.

[8] The court below has, in similar contexts, allowed death sentences to stand where the aggravating aspect of evidence was given effect under the second special issue, but no instruction directing jurors to consider the mitigating aspect of that same evidence was required. *See, e.g., Earhart v. State*, 823 S.W.2d 607, 619 (Tex. Crim. App. 1992). In *Earhart*, the Texas court allowed the state to use evidence of the defendant's mental illness as aggravating proof under the second special issue while denying him an additional instruction under *Penry*. *See Earhart v. Texas*, No. 92-8105 (currently pending on petition for writ of certiorari); R.B. at 19.

The Court of Criminal Appeals' consistent refusal to adopt instructions guiding jurors in the application of the special issue questions underscores another weakness of Respondent's argument. The capital sentencing law of Texas is what the court below says it is, not what Respondent wishes it might be—or might have become—if the facially valid former Texas sentencing statute had been construed differently.

Common sense dictates that the "future dangerousness" issue, contrary to Respondent's assertions, does not magically transcend its evident character as a narrow *factual* inquiry to become instead a vehicle for assessing the appropriateness of a death sentence in light of the defendant's personal culpability. This Court recognized as much in 1976, when it first considered the facial constitutionality of Texas' post-*Furman* statute. Addressing the second special issue, the Court acknowledged that it required precisely the same pedestrian inquiry "performed countless times throughout the American system of criminal justice." *Jurek*, 428 U.S. at 276. This Court recognized that the second special issue asks the same factual question as a judge's "decision whether to admit a defendant to bail." *Id.* at 274. As the latter situation does not naturally require the plenary consideration of a defendant's moral culpability, neither does the "future dangerousness" question of the former Texas scheme.

C. *JUREK V. TEXAS* DOES NOT REQUIRE A RESULT DIFFERENT FROM THAT SOUGHT BY MR. JOHNSON.

Respondent implies that to acknowledge the inadequacy of the former Texas "special issues" as a vehicle for considering Mr. Johnson's youth is to overrule *Jurek v. Texas*, 428 U.S. 262 (1976). At the outset, Mr. Johnson disclaims

any argument that *Jurek* need be overruled. *Jurek*, like its companion cases, is properly understood as sustaining the former scheme against a facial constitutional challenge. That the 1976 decisions confirmed only the facial validity of the Texas, Georgia, and Florida statutes is evident from their explicit language. *See Jurek*, 428 U.S. at 272 (considering the adequacy of the "special issues" on their face, given that the Texas courts had not yet "define[d] precisely the second special issue" nor "construed the first and third special issues" at all); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("On their face these procedures seem to satisfy the concerns of *Furman*"); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*").

More importantly, this Court's decision in *Penry* has directly answered this argument. *Penry* held, consistent with *Jurek*, that the Texas special issues as construed by the Texas courts did not permit adequate consideration of Penry's evidence of mental retardation. *Penry* confirmed that, as five Members of the Court had intimated in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), *Jurek* did not "preclud[e] a claim that, in a particular case, the jury was unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues." 492 U.S. at 321. In a similar vein, the Court has continued to adhere to its facial approval of the Georgia and Florida schemes even though it has sustained as-applied challenges to both those statutes. *See Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding that aggravating circumstance provisionally approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), was not applied constitutionally in Godfrey's case); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (holding that Florida scheme provisionally approved in *Proffitt v. Florida*, 428 U.S. 242 (1976), was unconstitutionally applied to a defendant who

sought consideration of unenumerated mitigating circumstances).[9]

Finally, in deciding to what extent, if any, *Jurek* is relevant to the disposition of Mr. Johnson's constitutional challenge, this Court should consider the posture in which the Texas statute came before it in 1976. Texas was one of several states (including North Carolina and Louisiana) that had read *Furman* to require substantially *less* sentencer discretion in capital sentencing. *See Furman v. Georgia*, 408 U.S. 238 (1972).[10] Accordingly, none of the

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[9] Recognizing that this Court's 1976 decisions determined only the facial constitutionality of unique capital sentencing schemes, the lower federal courts have likewise found merit in as-applied challenges to those same schemes. *See, e.g., Spivey v. Zant*, 661 F.2d 464 (5th Cir., Unit B, 1981) (requiring additional jury instructions regarding the consideration of mitigating evidence under the sentencing scheme facially upheld in *Gregg*); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir., Unit A, 1981) (requiring additional jury instructions regarding the consideration of mitigating evidence under Mississippi's sentencing scheme, substantially similar to the one facially upheld in *Proffitt*).

[10] It was reasonable for States to consider the opinions in *Furman* as constitutionally requiring the elimination of all discretion in capital sentencing. *See, i.e., Furman*, 408 U.S. at 307-308 (Stewart, J., discussing the possible constitutionality of mandatory sentencing schemes); *Id.*, at 310 (White, J., indicating that mandatory death penalty schemes would present a different issue than the one raised by discretionary statutes).

This suggestion was so obvious that the Chief Justice, in dissent, commented:

> Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. . . . It seems remarkable to me that with our basic trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them.

Id., at 401-402 (Burger, C.J., dissenting).

petitioners challenging those new statutes claimed that they unduly circumscribed sentencer discretion, and neither the briefs nor the oral argument in this Court focused on whether the Eighth Amendment required individualized sentencing. The Court, however, in examining these mandatory/quasi-mandatory statutes, recognized that such an impulse to deny individualized sentencing was simply an understandable, though ultimately misguided, reaction to *Furman*, and not evidence of an emerging societal consensus that individualized sentencing should be abandoned. In *Woodson v. North Carolina*, for example, this Court said:

> In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until *Furman*, it seems evident that the post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution rather than a renewed societal acceptance of mandatory death sentencing.

428 U.S. 280, 298 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (notes omitted).

Thus, in its 1976 death penalty cases, the Court was required to determine whether *Furman* required *no* discretion, or *some* discretion; it did not endeavor to decide *how much* discretion was mandated, or what end the exercise of that discretion was intended to promote. Based on its broad perception that Texas had not abandoned individualization altogether, the Court sustained the former Texas scheme. The Court did not purport to address whether specific mitigating evidence could be fully considered and given effect within the "special issues," precisely because neither the record below nor the adversarial presentation in this Court addressed that issue. Thus, any claim that *Jurek* involved a searching as-applied challenge to the

degree of individualization permitted by the former Texas scheme is plainly mistaken.

Hence, the Court's reading of *Jurek* in *Penry* accurately represents the relationship between the 1976 cases and subsequent decisions concerning as-applied challenges to particular state statutes that precluded consideration of mitigating evidence.[11] This historical and contextual understanding of this Court's precedents thus confirms that *Jurek* is not "difficult to reconcile," R.B. at 14, either with *Penry* or with Mr. Johnson's constitutional challenge to his death sentence.

CONCLUSION

Respondent at last submits that "the inherently 'moral' nature of the [capital sentencing] jury's decision" will somehow compel juries to ignore the fact-based inquiries of the former Texas sentencing scheme and consider all relevant dimensions of mitigating evidence before assessing punishment. *See* R.B. at 36. Respondent thus seems to suggest that Texas jurors will regularly flout their solemn oath and ignore the letter of their instructions in order to arrive at the sentence they think appropriate. *Id.* This Court should decline Respondent's cynical invitation to ignore the patent deficit of the former "special issues" as applied to a teenage defendant. As recognized in 1976:

> There is an element of capriciousness in making the jurors' power to avoid the death penalty de-

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[11] This Court has since recognized the symmetry between these two precedents:

> *Penry* interpreted *Jurek* as holding the death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant.

Saffle v. Parks, 494 U.S. 484, 492 (1990).

> pendent on their willingness to accept this invitation to disregard the trial judge's instructions.

Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 335 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). *See also Beck v. Alabama*, 447 U.S. 625, 643 (1980) (such procedures "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (the constitutionality of a scheme cannot rest on a "particular jury's willingness to act lawlessly.")

While the former Texas special issues may permit the jury to consider youth for some *other* purpose, they do not permit the jury to consider it as reducing the defendant's culpability so as to justify a life sentence. Therefore, for all the reasons set out in Mr. Johnson's opening brief, and in this Reply, he renews his request that this Court reverse the judgment of the Texas Court of Criminal Appeals in his case and remand with directions to vacate his unconstitutional sentence of death.

Respectfully submitted,

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